to family rights, including the action for breach of promise of marriage, be more thoroughly and objectively studied than has yet been done by English and American legal authorities.

O. K. M.

PROPERTY: ESTATES AT LAW AND IN EQUITY.—Two decisions upon the law of estates by the same court, made only two weeks apart,[1] illustrate some of the difficulties in which our law has become entangled through the partial and imperfect amalgamation of the rules of law and those of equity, and fully justify Dean Taylor's criticism, in a recent number of this Review, of the fallacious method by which that amalgamation was attempted to be brought about—namely, through a mere change in procedure rather than through a restatement of our law upon a substantive basis.[2]

In *Tracy v. Donovan* the District Court of Appeal for the Second Appellate District of California holds that where a tenant enters land under a parol agreement for a lease for two years, he becomes a tenant at will and upon payment of the annual rent is converted into a tenant from year to year. There is, of course, nothing novel in this holding, which is merely a statement of familiar common law principles. The novelty of the opinion consists in holding that the rule adopted by common law courts, that such a tenancy from year to year did not require notice for its determination, because notice of such time was implied in the very fact that by the terms of the parol agreement the tenancy was to expire in two years,[3] is not law in California. In this state, though the tenant holds during the two years according to the agreement, he may not be dispossessed at the end of the period, unless written notice has been given him at least thirty days before. This because section 789 of the Civil Code requires such written notice in the case of every tenancy at will, "however created."

In the case of *Bekins v. Smith,* decided just fourteen days before the decision in Tracy v. Donovan, the same court holds that where one purchases land for the purpose of permitting another to use it for religious purposes so long as the latter conduct the sort of services she was then doing, and the beneficiary enters under the agreement, there is created not a mere tenancy at will but an estate for life in favor of the beneficiary.[4] Upon

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[1] Tracy v. Donovan (May 27, 1918), 26 Cal. App. Dec. 1070; Bekins v. Smith (May 13, 1918), 26 Cal. App. Dec. 976.

[2] Edward Robeson Taylor, The True Path to a Proper Administration of Justice, 6 California Law Review, 191, March, 1918.

[3] Taylor, Landlord and Tenant (9th Ed.), §§ 80, 469 and 471; Doe dem. Tilt v. Stratton (1828), 4 Bing. 446.

[4] Husheon v. Kelley (1912), 162 Cal. 656, 124 Pac. 231, is the principal case to this point.

strict common law principles, there is no doubt that, if the form of the conveyance is sufficient, an estate for life is created wherever an interest may last for the life time of the grantee. The test is not whether it must last for life but whether it may do so. A conveyance to B for so long as he chooses to occupy land is an estate for life.[5] But it is equally clear that at common law, an estate for life could not be created by mere agreement plus entry, and the common law requirement as to formality is preserved by section 1091 of the Civil Code, which requires a written conveyance in the case of all estates greater than those for one year. Indeed, it was solely the existence of this rule as to form that prevented the agreement in Tracy v. Donovan from becoming a lease for two years, in accordance with the intent of the parties. In essence therefore Bekins v. Smith rests upon equitable principles in disregarding form. It is difficult to see any substantial distinction how ever between the case where the owner of the land tells another that he may enjoy land for two years and where he tells him he may enjoy it so long as he likes or for his life time. In neither case at common law is any interest created by the beneficiary's entry greater than a tenancy at will. On the other hand, in both cases, where there is a valid contract with change of possession and performance, equity will enforce the contracts specifically.[6]

Bekins v. Smith, indeed, carries equitable principles rather further than would have been done by the court of chancery which established them, for it determines that the title passed to the intended grantee for life without formal conveyance, not merely that she was entitled to specific performance. In other words, it in effect gives specific performance without the party entitled making a formal demand.[7] With this we have no quarrel. It is in line with a more or less vaguely evolving tendency to disregard the distinction between legal and equitable estates and interests, a tendency which is accompanied by a new distinction, designed for the protection of society, namely, that between the reputed title and the real title.[8]

Our difficulty is not with Bekins v. Smith but with Tracy v. Donovan. It is impossible to refrain from the question in reading the cases together—why look through equitable spectacles in one case and through legal spectacles in the other? If the defendant Smith was a tenant for life, why was not the defendant Donovan

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[5] Co. Lit. 42 a, b; Coleman's Estate (1907), 1 Ir. 488; Zimbler v. Abrahams (1903) 1 K. B. 577; 1 Tiffany, Real Property, pp. 138-9 and note 359.

[6] 1 Tiffany, Landlord and Tenant, p. 393.

[7] Pomeroy, Code Remedies (4th ed.), § 29; Husheon v. Kelley (1912), 162 Cal. 656, 124 Pac. 231.

[8] Upon this tendency see Ewart on Estoppel, *passim*; Jenks, A Short History of the English Law, (Little, Brown & Co. ed.), pp. 271-274. The most striking instance of this tendency is afforded by our recording acts.

equally a tenant for two years? Why disregard the formal requirements of the common law in one case and observe them in the other? It is worthy of observation that the decision in Tracy v. Donovan impliedly attributes to the authors of the Civil Code a purpose to restore the technical demands of the common law as they existed at a time before that law was itself liberalized by the example and influence of the court of chancery. Even the common law judges before the middle of the ninteenth century were accustomed to regard a tenant in possession under an agreemen for a lease as in effect a tenant for years though they were obliged to define him technically as a tenant at will. In 1840 Lord Denman said that where "the defendant was let into possession under an agreement, which gave the parties a right to go into equity to compel the execution of it by making out a formal lease . . . . it has long been the uniform opinion of Westminster Hall that the tenant in possession holds upon the terms of the intended lease."[9] Since the passage of the Judicature Act, in a frequently discussed case, Sir George Jessel, M. P., said: "There is an agreement for a lease under which possession has been given. Now since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one court and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance."[10]

The principle enunciated by Jessel finds support in Bekins v. Smith, but is overlooked in Tracy v. Donovan. Indeed, the Supreme Court has carried the principle upon which the first named case rests even further than Jessel's dictum demands in holding that a vendee in possession, not only before but even after default, is not a tenant at will. It is, of course, familiar doctrine

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[9] Doe dem. Thomson v. Amey (1840), 12 Ad. & E. 476.

[10] Walsh v. Lonsdale (1882), 21 Ch. D. 9, 14 (C. A.), Cf. Manchester Brewery Company v. Coombs [1901] 2 Ch. 608; Foster v. Reeves [1892] 2 Q. B. 255; Maitland, Equity, p. 161; Goodeve, The Modern Law of Real Property (5th ed.), 154, note k. Cf. Purchase v. Lichfield Brewery Co. [1915] 1 K. B. 184. It is not essential here to go into the true nature of equitable rights. The fact that some of our greatest legal scholars are still discussing the question whether a chose in action is really asignable or whether a cestui que trust has a right in rem or in personam, is a good indication of how imperfect is the merger of law and equity. Those who desire to follow the discussions by Dean Stone, Professor Scott, Professor Cook and Professor Williston may be referred to the articles in Vol. 17 of the Columbia Law Review at pages 270 and 467, and in the Harvard Law Review, Volume 29, p. 816, Volume 30, pages 99 and 449, and Volume 31, page 822.

that the common law courts were obliged to hold him to be merely a tenant at will, even though he had fully performed his contract, whereas equity regarded him as an owner from the moment his contract was made. Equitable principles have so far supplanted the common law now-a-days that he is regarded after default as a grantee with a defective title and in no sense a tenant at will.[11] The reconciliation between law and equity which the courts have made in this matter of vendor and vendee is like that which the walrus and the carpenter made with the oysters in Alice in Wonderland. The line of decisions of which Francis v. West Virginia Oil Company is an instance of another reason why Tracy v. Donovan should be carefully weighed before its authority is absolutely recognized. Our courts have so often sustained the paramountcy of equitable principles where they conflict with legal principles that we may well be permitted to question whether the last word has been said upon the law involved in the last named case.

In justice to the court which decided Tracy v. Donovan it should be pointed out that it rests its opinion upon statements of the highest tribunal in the state. The Supreme Court has expressly said that one who enters on land under an greement for a lease is a tenant at will.[12] But that was said in answer to the contention that such a person is a mere trespasser. The answer was sufficient to meet the objection without the necessity of resorting to equitable principles, for the defendant's position in Carteri v. Roberts was without foundation in common law, equity or statute. Perhaps, no just ground for complaint can be urged against the District Court of Appeal for yielding to the authority of the decision of the Supreme Court in Carteri v. Roberts, though in following that guide it has brought the law of landlord and tenant upon this subject into an unfortunate condition. The task is for the Supreme Court to harmonize Carteri v. Roberts on one side with Francis v. West Virginia Oil Company and Husheon v. Kelley on the other. The intermediate court of appeal is hardly deserving of criticism for failure to perform that task. However, it would seem not very difficult to fit Carteri v. Roberts into the line of authority represented by the cases just mentioned. Carteri v. Roberts merely decides that even upon common law principles as they existed before the amalgamation of law and equity, one who entered under an agreement for a lease was at the very least a tenant at will. In truth, he is much more, though the court did not have to decide that proposition in the case before it.

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[11] Francis v. West Virginia Oil Co. (1917), 174 Cal. 168, 162 Pac. 394. See also Pomeroy v. Bell (1897), 118 Cal. 635, 50 Pac. 683, Coates v. Cleaves (1891), 92 Cal. 427, 430, 28 Pac. 580. Cf. Hall v. Wallace (1891), 88 Cal., 1434, 26 Pac. 360; 2 Tiffany, Landlord and Tenant, § 273d.

[12] Carteri v. Roberts (1903), 140 Cal. 164, 73 Pac. 818.

In the article previously referred to Dean Taylor says:[13] "The course of equity has been over the dead body of the law, and necessarily so. The writer has no lament for this, but only satisfaction. The equity judges in England and in this country have reared a legal monument magnificent to behold. By their actions and writings they have turned a barbarous code of law into one humane and tolerable. The lamentable thing is that they were so shortsighted, so lacking in vision, as not to combine the two, as not to see that no country could properly progress under two systems of rights. . . . . It was thought by those who years ago were instrumental in getting up our so-called Reformed Procedure that that would bring the needed reform, but it has egregiously failed as it was bound to fail, for it was an attempt to amend the substantive law by changing the remedial law. Manifestly the substantive law was the thing to be amended, and so amended as to give us but one system of rights and not to keep on foot the present absurd system, or no system. In fact, we possess the luxury of three systems: Real Property, Law and Equity." Had our law of estates, to confine our attention to the instance under consideration, been restated not in terms of the common law but in those terms as liberalized and rationalized by equity, such an elementary question of daily business practice as that involved in Tracy v. Donovan would not now be in doubt.

It is a striking commentary upon the incompleteness and crudity of the attempted unification of the principles of law and equity that in none of the California cases mentioned in the body of this note is there any reference to the very elementary distinctions between legal and equitable estates.[14] The reason for this neglect is not far to seek. Text writers still continue, especially when dealing with a subject so fruitful in legal distinctions as the law of landlord and tenant, to state the law in terms of the common law, lawyers to reason in the same terms, law teachers to discuss legal propositions with students under the same formulae. As Maitland says: "The forms of action we have buried, but they rule us from the grave." So long as our guides and signposts continue to use the language of a past system, so long will our courts occasionally overlook the quest for justice and follow in the footsteps of the dead.

O. K. M.

WATERS: RIGHTS TO ABANDONED WATER.—Do riparian rights attach to waters brought in from another watershed and abandoned by the producers thereof? This point is brought up

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[13] 6 California Law Review, pp. 194-5.

[14] The fact is an additional illustration of the proposition which Dean Pound maintains in his article on the Decadence of Equity, 6 Columbia Law Review, 20, that one of the unfortunate results of the reformed procedure has been a neglect of equitable principles.